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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-715

PIONEER LUMBER CORPORATION,
a West Virginia corporation,
Petitioner

vs.

JOHN S. MAYS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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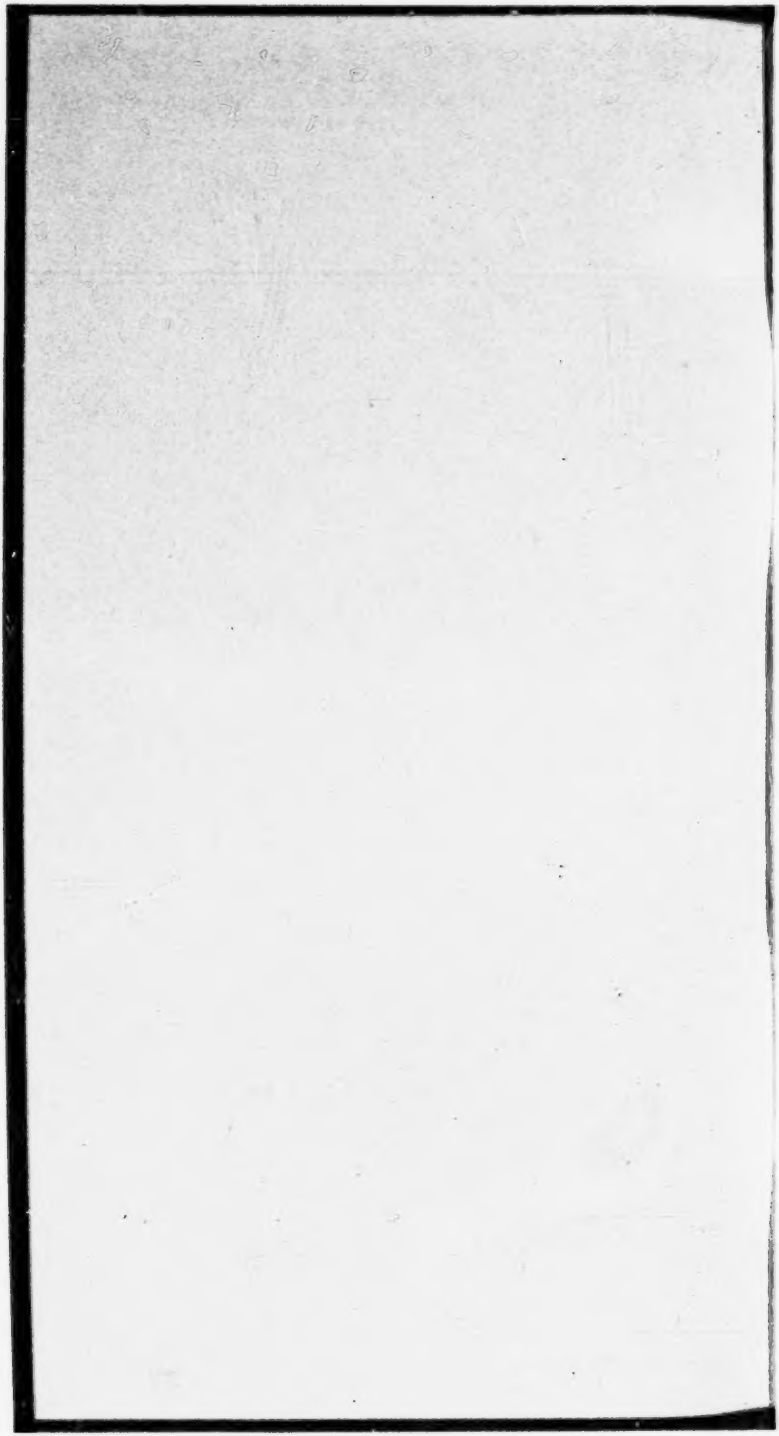

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PETITION FOR A WRIT OF CERTIORARI
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FOR THE FOURTH CIRCUIT

The petitioner, PIONEER LUMBER CORPORATION, a corporation, prays that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit rendered in these proceedings.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 502 F.2d 106. The memorandum opinion of the District Court, not recorded, appears in Appendix A, *infra*.

JURISDICTION

The order or judgment of the United States Court of Appeals for the Fourth Circuit was entered on September

13, 1974. See Appendix A, *infra*. This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The decision below conflicts with decisions of this Court. It cannot be sustained on the ground advanced by the Court below to sustain it. Probable jurisdiction should be noted and the case set for argument on the merits.

QUESTIONS PRESENTED

The questions arising are:

1. Whether the United States Court of Appeals was in error in holding that there was sufficient evidence presented in the District Court to sustain the jury verdict.

2. Whether the United States Court of Appeals for the Fourth Circuit should have remanded the case to the District Court for a ruling on Pioneer's motion for a new trial.

STATEMENT OF FACTS

Mays brought this action in the United States District Court for the Southern District of West Virginia on July 17, 1970, and in his complaint alleged that he was injured on July 25, 1968, in Braxton County, West Virginia, when an employee of Pioneer negligently drove a forklift against a load of logs on Mays' truck, thereby causing the logs to fall and injure Mays. Mays' wife was originally joined as a plaintiff, but was later dismissed from the action.

Pioneer filed an answer denying any negligence and asserting the defenses of contributory negligence and assumption of risk. The action was tried on June 2, 3 and 4, 1971, and resulted in a mistrial due to a hung jury. The

action was again tried on July 6, 7 and 10, 1972, with the jury returning a verdict for Mays and against Pioneer in the amount of Forty Thousand Dollars.

On July 17, 1972, Pioneer filed a motion to set aside the verdict of the jury and enter judgment for Pioneer, which motion was granted by the Court on August 29, 1972. Mays thereafter moved to have the verdict and judgment reinstated, which motion was denied by the Court.

It was the contention of Mays that he was an independent contractor of one Robert Reed, who in turn had a contract with Pioneer for hauling logs to Pioneer's sawmill in Braxton County, West Virginia. It was further the contention of Mays that after he had driven his truck loaded with logs to the sawmill and was in the process of removing the binder chains from around the logs that one French Young, an employee of Pioneer, drove a forklift into the opposite side of Mays' truck, thereby toppling two logs from the truck, thereby causing Mays' injuries. The forklift was used for the purpose of picking up logs in the yard and also to prevent logs rolling down the hill as they were unloaded to avoid any damage to the mill or employees.

The only testimony offered in behalf of the plaintiff as to liability was that of Mays himself. Mays testified that he drove his log truck into the yard and it was loaded with a large load of logs, each measuring 14 inches to 20 inches in diameter, and being 10 feet to 16 feet in length. The logs were held on the truck by means of two upright standards on each side of the truck bed and, in addition thereto, there were two binder chains which went around the load of logs and the truck bed. In the process of unloading, Mays went to the uphill side of the truck and

removed the binder chains from around the logs. He thereupon loosened one of the upright standards, but could not get the other standard to release so that the logs would fall off the truck. He went to the cab of his truck to attempt to locate a pry bar, but could not find one. He thereupon shut the truck door, came back to the standard, and was in the process of attempting to jerk the standard chain loose when two logs toppled from the top of the load and injured Mays' leg.

Mays did not see the forklift strike the logs or the truck. His testimony was that after the accident, when he was on the ground looking under the truck, he saw the forklift tire sitting "right tight" against the truck. In other words, Mays inferred that because the forklift tire was near the truck that the forklift must have struck the logs and caused them to come off the truck.

Since Mays' testimony was the only testimony as to liability, we believe that it is important to quote in part from his testimony on cross examination:

* * *

"Q Mr. Mays, you testified earlier, I believe, that you didn't see the forklift strike your truck, if indeed it did. Is that correct?

A I couldn't see through the load of logs. I was standing fixing the load of logs. I couldn't see through the load of logs.

Q And therefore you didn't see the forklift strike your load, if indeed it did. Correct?

A I felt it. An awful jar almost pushed the truck up the hill.

Q I understand. That's your testimony, but let me make myself clear. You did not see the

forklift truck strike your load of logs. Is that correct?

A That's correct."

* * *

"Q Is it not correct that you testified about a year ago under oath that 'I seen the big forklift that was setting six to eight foot from the truck. The big tire on the forklift.' Did you so testify?

A Yes, sir.

Q Was your recollection then accurate to the best of your knowledge and ability?

A Yes sir. It was right up at the truck."

Included in the record is the testimony of Mays at the trial beginning on June 2, 1971. Mays testified as follows:

* * *

"Q And what happened to you then? Where were you?

A I was laying on the ground on my back, on my elbows.

Q Let's see—tell us what if anything you saw at that time?

A I seen the big forklift through there under the truck tires, the wheel on the big forklift that was setting 6 to 8 foot from the truck. The big tire on the forklift."

To establish the fact that Pioneer's forklift did not strike Mays' truck or the logs, Pioneer introduced the testimony of six eyewitnesses; Roy Milliner, Frank Barton, Larry Mack, Robert Reed, French Young and Lee Smith.

Roy Milliner testified that he noticed Mays unhooking his chains. He then heard the logs rolling, and looked up

and saw Mays lying on the ground. At the same time he saw the forklift sitting 10 feet below the truck in a stationary position. At the time, Milliner was standing 40 feet from Mays' truck, and stated that the forklift did not bump the truck or the logs.

Frank Barton testified that he was standing approximately 75 to 100 feet from Mays' truck, saw Mays knock the chain loose on the truck, and then saw the logs fall off. At this time, the forklift was stationary and situated between 10 and 15 feet away from the truck. Mr. Barton was positive in stating that the forklift did not strike the truck or any of the logs on the truck.

Larry Mack testified that he was standing outside the filing room of the sawmill and saw Mays go up around behind his truck. The next thing he saw was Frank Barton running toward the truck. Mack then ran up to the truck to see what was wrong, and in doing so, ran past the forklift. As Mack ran by the forklift, it was stationary and sitting on the lower side of the truck about 15 feet from the truck. At no time did the forklift strike the truck or logs.

Robert Reed testified that Mays was doing contract hauling for him. At the time of the accident, Reed was in the company office about 100 or 200 feet from the log yard. Learning that something had happened, he immediately went to the yard and saw Mays lying on the ground. This is verified by Mays, who testified that Reed was the first person who got to him. Reed testified further that when he came out of the office and went toward where Mays was, the forklift was stationary and was 15 or 20 feet from the truck.

French Young, the operator of the forklift, testified that on the day in question, he was operating the fork-

lift, and when Mays drove into the yard, Young moved the forklift to the down hill side of the truck in order to stop logs when Mays unloaded them. Young then saw Mays remove the binder chains from the logs and then Mays went round behind the truck on the uphill side out of Young's vision. At that time, the forklift was 10 or 15 feet down hill from the truck with the fork down on the ground and was stationary. The next thing that Young saw was Barton running toward the truck and thereupon knew that something had happened. Young further testified that at no time did he hit or touch the logs on the truck and never got closer to the truck than 10 or 15 feet.

Lee Smith, the last witness, saw the accident happen. Smith saw Mays unfasten the binder chains and as Mays attempted to trip his logs, two logs fell off, Mays attempted to jump over the first log and the other log fell and caught his leg. At that time Smith saw the forklift operated by French Young and the closest part of it was sitting 10 to 15 feet below the truck toward the mill. Smith positively testified that the forklift did not hit the truck or the logs.

REASON FOR GRANTING WRIT

The decision below directly conflicts with the principles enunciated in this Court's Chamberlain ruling.

In this case Mays himself was the only witness who attempted to show any negligence on the part of Pioneer. May's testimony, in a nutshell, was merely to the effect that he could not see the forklift but he felt a jar on the truck and thereby concluded that the forklift must have struck the logs and caused them to come off the truck. This testimony, at most, merely created an inference that Pioneer may have been negligent. Contrasted with this

testimony was the testimony of six eye-witnesses, all of whom testified that the forklift did not strike the truck or the logs.

The District Court correctly held that under the authority of *Pennsylvania R. R. Co.* vs. *Chamberlain* 288 U.S. 333, 77 L. Ed. 819 a mere inference created by the evidence must give way to the positive and uncontradicted testimony of other witnesses and that a verdict based upon such an inference cannot stand.

In *Chamberlain,* it was encumbent upon the plaintiff to prove that a collision occurred between a cut of railway cars upon which plaintiff's decedent was riding and another cut of cars ridden by fellow employees. The only testimony for the plaintiff was that of one witness who testified that he heard a "loud crash" and thereupon went to the spot and saw the deceased between the rails. Five witnesses for the defendant testified that there was not collision between the two cuts of cars. The lower Court held that the testimony of plaintiff's witness created an inference that there had been a collision and the question was therefore for the jury. The Supreme Court, however, held that the testimony of the plaintiff's witness merely created, at most, an inference which was destroyed by the positive testimony of the witness for the defendant. On Page 340, the Court says:

> "And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist . . . A rebuttable inference of fact, as said by

> the court in the Wabash R. Co. Case, 'must necessarily yield to credible evidence of the actual occurrence.' And, as stated by the court in George v. Missouri P. R. Co. 213 Mo. App 668, 251 S. W. supra, 'It is well settled that where plaintiff's case is based upon an inference or inferences, that the case must fail upon proof of undisputed facts inconsistent with such inferences.' . . ."

The Court of Appeals clearly misconstrued the holding in *Chamberlain* and attempted to dismiss its rule by stating that it is inconsistent with the recognized rule that on a motion for directed verdict the Court must credit the non-moving party with all reasonable inferences and, as authority therefore, cited *Continental Ore Company* vs. *Union Carbide Corporation,* 370 U.S. 690 (1962). We believe that the Court misconstrues the holding in *Continental* since that case involved competing inferences and did not involve a situation where there was a mere inference on one side and direct positive and conclusive evidence on the other.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted

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Counsel for Petitioner

IN THE DISTRICT COURT OF
THE UNITED STATES FOR THE SOUTHERN
DISTRICT OF WEST VIRGINIA

AT CHARLESTON

JOHN S. MAYS, et al,
Plaintiff,

v.) Civil Action No. 70-147

PIONEER LUMBER CO.
Defendant.

MEMORANDUM ORDER

Before the Court for consideration is the motion of the defendant, Pioneer Lumber Company, seeking to have the verdict of the jury, which was in favor of the plaintiff, John S. Mays, in the amount of Forty-Thousand Dollars, and the judgment entered thereon, on the 10th day of July, 1972, set aside, and to have judgment entered for the defendant, or in the alternative, grant a new trial under the provisions of Rule 50(b) of the Rules of Civil Procedure. This case had been initially tried on June 2, 1971. The jury therein was unable to reach a verdict and a mistrial was declared. Subsequent thereto, on March 3, 1972, defendant filed a Motion for Summary Judgment which was denied by the Court by Memorandum Order entered April 27, 1972.

The single issue raised by the motion now under consideration is whether the evidence, viewed in the light most favorable to plaintiff, was sufficient on the question of the alleged negligence of the defendant to warrant submission of same to the jury. Having carefully re-

viewed the evidence presented and the law applicable thereto, it is my considered opinion that the Court should have granted defendant's motion for a directed verdict at the trial, and that judgment should now be entered for the defendant. The verdict is clearly not supported by a preponderance of the evidence.

Giving effect to all reasonable inferences most favorable to plaintiff, the following facts are established:

Plaintiff, John Mays, was the owner of a 1968 Chevrolet two-ton truck and was engaged in the business of hauling logs under contract with one Robert Reed. The defendant, Pioneer Lumber Company, owned a saw mill located at Frametown, Braxton County, West Virginia. On July 25, 1968, the day of the accident which injured plaintiff, plaintiff was delivering a load of logs to Pioneer Lumber Company's sawmill. This was the first day he had used the truck for hauling logs. Upon arrival at the lumber yard, plaintiff parked his truck in the unloading area above the mill, perpendicular to the slope of the hill. French Young, an employee of defendant, was operating a log lift at the lumber yard. It was part of his job to position the log lift on the lower side of the truck, between the truck and the mill, to prevent the logs from rolling into the mill when released from the truck. The log lift had forks which extended from the front of the machine and were used for moving the logs. The logs on Mr. Mays' truck were secured by several chains. In order to release the logs it was necessary for him to trip the two trip chains. He went to the back trip chain and snapped it loose. The tension went off the chain, however no logs fell. He then went to the front standard and attempted to loosen it, but was unable to do so. After ascertaining he did not have a bar to pry the standard loose, plaintiff again went back to the trip chain and

attempted to loosen it. While doing so, he felt a "big jar" and two logs fell from the truck, injuring plaintiff. Plaintiff did not know what had caused the jar. After his injury he claimed he saw the wheels of the log lift in a position six to eight feet from the truck, and concluded therefrom, that the log lift had struck the truck. However, by his own admission, he did not see the forks of the log lift extended and was unable to see the lower side of the truck, and consequently, did not see the log lift hit his truck. At the trial six eye-witnesses, employees of the defendant, including the operator of the log lift, testified that they had observed the accident and that the log lift had not come into contact with the truck.

Plaintiff contends that the evidence herein, even if only a scintilla, at least raises an inference of negligence, cognizable under the law of the State of West Virginia, and that this circumstance alone warranted submission of the issue to the jury. While the federal law is controlling on the question here presented, as is hereinafter pointed out, the law of West Virginia, as the Court understands it, does not support plaintiff's contention. The rule is succintly stated in Syllabus point 5 of the case of *Ketterman* v. *Railroad Co.*, 48 W.Va. 606, 37 S.E. 683, in these words:

> "In actions for negligence, the courts have arbogated the doctrine that a mere scintilla of evidence from which there might be a surmise of negligence is sufficient to carry a case to the jury, and have adopted the more reasonable rule that there is a preliminary question which the judge must decide, if asked, whether granting to the testimony all the probative force to which it is entitled, a jury can properly and justifiably infer negligence from the facts proved; for, while negligence is usually an inference from facts, it

> must be proved, and competent and sufficient evidence is as much required to prove it as to prove any other fact."

The general principle that there is no federal general common law, and that in a diversity case the federal court should apply the substantive law of the state in which it is sitting is well established. *Erie R. Co.* v. *Tompkins,* 304 U.S. 64. However, the Supreme Court has not passed upon the specific question of whether sufficiency of evidence is a matter of procedure controlled by federal law or a matter of substance falling within the scope of the pronouncement of the court in *Erie R. Co.* v. *Tompkins,* supra. Our Fourth Circuit Court of Appeals, however, has held that federal law controls, reasoning that the rule as to sufficiency of evidence was not bound up with the primary rights and obligations of the parties, and further, that is was not the kind of rule which must inexorably find its government, in a diversity case, in the corpus of state law. *Wratchford* v. *S. J. & Sons Co.,* 405 F.2d 1061 (4th Cir. 1969). To the same effect is the case of *Cater, et al.,* v. *Gordon Transport, Inc., et al.* 390 F.2d 44 (1968), wherein the court said "Although jurisdiction in this case is based upon diversity of citizenship, and therefore state law is controlling as to the elements of the cause of action, the question of the sufficiency of evidence to go to the jury on a motion for a directed verdict pursuant to Rule 50, F.R. Civ.P. is controlled by federal law."

In any event, on the question at issue here, the federal rule and the state law are not at substantial variance. *Ice* v. *County Court,* 77 W.Va. 152, 87 S.E. 75, *Herron* v. *Maryland Casualty Company,* 347 F.2d 357 (1965).

The facts in the case at bar are very similar to the facts in the case of *Herron* v. *Maryland Casualty Company,*

supra. In that case, a tractor operator brought an action for injuries sustained when a clod of dirt fell upon him from the bucket of the tractor he was operating. Although he did not see the truck which he was attempting to load at the time of the accident strike him, it was his belief that it had done so. The court therein, in sustaining a directed verdict for the defendant, stated that:

> ". . . the mere occurrence of an accident does not give rise to a presumption of negligence. In an action in tort in Louisiana the plaintiff has the burden to prove negligence as an affirmative fact. The mere statement of plaintiff's belief does not support a reasonable inference that the truck struck the tractor. Certainly the plaintiff has not supplied facts which show that the truck driver negligently struck the tractor."

Plaintiff, in the instant case, can only testify as to what he believes happened. No evidence was introduced to substantiate this belief.

Plaintiff's counsel argues that plaintiff's belief as to what happened, coupled with the fact that the logs fell off on the uphill side of the truck, was sufficient to permit the matter to go to the jury. With this contention, the court cannot agree. It is well settled that where plaintiff's case is based upon an inference or inferences, he cannot prevail where there is proof of undisputed facts inconsistent with such inferences. Even in cases where proven facts give support to each of two inconsistent inferences, neither inferences having been established, judgment as a matter of law must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. Moreover, the scintilla rule has been definitely and repeatedly rejected by the federal courts and a verdict

cannot rest on mere speculation. *Penna. R. Co.*, v. *Chamberlain*, 288 U.S. 333 (1932). Plaintiff must rest his case solely upon claimed inferences derived from facts proved which are not in substantial conflict. Otherwise his claim is left without any credible support in the evidence. Since the facts here are insufficient, in the court's opinion, to give rise to a reasonable inference of negligence, the verdict for plaintiff then rests solely upon speculation and conjecture.

It was not disputed that the log lift was physically present at the scene at the time of the accident. However, there was no evidence of a collision, and the plaintiff is unable to state whether there had been a collision. This has been sufficient for a directed verdict. *Cater, et al.*, v. *Gordon Transport, Inc.*, 390 F.2d 44, cert. den. 392 U.S. 927; *Herron* v. *Maryland Casualty Company*, supra. Plaintiff was frank to admit that he did not see the fork lift blades strike his truck or legs. He did feel a jar as the logs rolled from the truck while he was trying to disengage one of the standards. Although after the accident he saw the wheels of the log lift six to eight feet from his truck, he could not see whether the blades were extended. On the other hand, there was an abundance of testimony from eye witnesses that the log lift did not come in contact with plaintiff's truck. These facts, viewed most strongly in favor of plaintiff, do not give rise to an inference of negligent conduct on the part of the defendant required to support the verdict of the jury.

The Court is painfully aware of the severe and disabling injuries suffered by the plaintiff and the great responsibility it has in discharging its duty in resolving the question presented. It has not considered this matter lightly. The Court is convinced, however, that the plaintiff failed to make a prima facie case of negligence. The

Court therefore should have granted defendant's motion for a directed verdict.

Even if any inference in favor of plaintiff's claim may possibly be raised from facts appearing in this record, it must be considered along with the other evidence in the case, and if upon the evidence, viewed as a whole, there is no room for doubt as to the fact in issue, the question is one of law and it is the duty of the court to direct a verdict. *Gorham* v. *Mutual Ben. Health and Accident Ass'n.*, 114 F.2d 97 (4th Cir. 1940), cert. den. 312 U.S. 688. Only where evidence is conflicting, or from which different inferences can reasonably be drawn, is the question one for the jury.

Furthermore, the verdict of the jury herein is against the clear preponderance of the evidence and cannot stand. Since the court should have granted defendant's motion for a directed verdict at the conclusion of all the evidence, even if not at the time plaintiff rested his case, it is obligated to do so now under the provisions of said Rule 50(b).

In accordance with the views herein expressed, the court has concluded it is duty bound to set aside the verdict of the jury, and the judgment entered thereon, and enter judgment for the defendant, and it is so ORDERED.

Dated this 29 day of August, 1972.

/s/Dennis R. Knapp
United States District Judge

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 72-2329

JOHN S. MAYS,

Appellant,

VS.

PIONEER LUMBER CORPORATION,
A WEST VIRGINIA CORPORATION,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

This cause came on to be heard on the record from the United States District Court for the Southern District of West Virginia, and was argued by counsel.

On consideration whereof, *It is now here ordered and adjudged by this Court that the judgment of the said District Court from, in this cause, be, and the same is hereby reversed.*

ENTERED SEPTEMBER 13, 1974
CIVIL ORDER BOOK NO. 40 PAGE 131
FILED AUGUST 22, 1974

William K. Slate, II, Clerk

A True Copy, Teste:
WILLIAM K. SLATE, II, Clerk
By.....
Deputy Clerk

WILLIAM K. SLATE, II
Clerk

COSTS FOR THE APPELLEE

Costs of printing appellant's brief	$ 49.59
Costs of printing appellant's reply brief	38.13
Costs of printing appellant's appendix	335.31
Docketing fee	25.00
Total Costs	$448.03

RESPONDENT'S BRIEF

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IN THE

Supreme Court of the United States

October Term, 1974

No. 74-715

PIONEER LUMBER CORPORATION,
a West Virginia corporation,
Petitioner

vs.

JOHN S. MAYS

BRIEF OF RESPONDENT IN OPPOSITION
TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 502 F.2d 106. The memorandum opinion of the District Court set out in Appendix A, of the petition was amended by order of the District Court on plaintiffs motion so as to strike therefrom the words "even if only a scantilla, at least" (page 3a Appendix to Petition).

JURISDICTION

The petition for certiorari herein was filed December 10, 1974. The judgment or order of the Circuit Court of Appeals was entered on August 22, 1974. More than ninety (90) days have elapsed from the time of that order and the filing of said petition. The decision below does not conflict with decisions of this Court. For the reasons hereinabove stated probable jurisdiction should

be denied and said petition should be held inprovidently filed.

QUESTIONS PRESENTED

The questions arising are:

1. Was the petition for writ certiorari inprovidently filed.

2. Was there sufficient evidence to sustain the jury verdict in favor of respondent.

3. Was the Circuit Court correct in its analysis of the District Judge's failure to act on petitioner's alternative motion for a new trial.

STATEMENT OF FACTS

The facts necessary to a decision herein are embraced within the Circuit Court's opinion in 502 F.2d 106.

ARGUMENT

Petitioner contends the Circuit Court's decision conflicts with the decision of this Court in *Pennsylvania R.R. Co.* v. *Chamberlain*, 288 U.S. 333, 77 Ed. 819 (1933). The *Chamberlain* decision, supra, is considered by the Court below in two views. The District Court had cited *Chamberlain* for the proposition that when proven facts equally support two conflicting inferences, the verdict must go against the party who has the burden of proof. This rule was rejected by *Lavender* v. *Kurn*, 327 U.S. 645 (1946).

The District Court's opinion was unclear as to that Court's application of *Chamberlain*. Two alternatives were presented i.e. either the District Judge was saying an inference can never sustain a verdict against contrary

testimony, which is incorrect; or, he was saying the inferences in this case as a matter of law were proved impossible by evidence the jury was not free to disregard. The Circuit Court below rightly decided this was not the case.

The Circuit Court, below, considered carefully the ramifications of *Chamberlain* and rendered its decision in conformity with reason, logic and all existing decisions of this Honorable Court.

The thrust of petitioners argument seems to be that the jury had to accept as true that the log lift did not dislodge the logs upon respondent. Petitioner is incorrect that its evidence was direct, positive and conclusive on this point. Petitioner is also incorrect that *Continental Ore Company* v. *Union Carbide Corporation*, 370 U.S. 690 (1962) dealt with competing inferences.

CONCLUSION

The petition should be held untimely, filed, but, if not, said petition should be denied as no appropriate reason for the issuance of a writ of certiorari has been set forth in the petition.

Respectfully submitted

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